Economic freedoms and labour standards in the European Union

Cremers, Jan

Published in:
Transfer: European Review of Labour and Research

DOI:
10.1177/1024258916635962

Publication date:
2016

Document Version
Publisher's PDF, also known as Version of record

Main Article

etui.

Transfer
2016, Vol. 22(2) 149–162

DOI: 10.1177/1024258916635962
trs.sagepub.com
SAGE

Economic freedoms and labour standards in the European Union

Jan Cremers
Department of Social Law and Social Policy, Tilburg University, the Netherlands

Summary

The European Union internal market seeks to ensure the free movement of goods, services, capital and citizens. The primacy given to these economic freedoms has culminated in a socio-economic reasoning dominated by competition, bringing about side effects that may pose a threat to working conditions and labour standards. This article examines the problematic relationship between economic freedoms and labour standards in the context of cross-border labour recruitment. It starts with a summary of the relevant EU *acquis*, in particular rules concerning social security coordination and the pay and working conditions of posted workers. It reviews key issues of the 'hard core' of the internal market legislation (free choice of contracts, freedom of establishment for firms, deregulation of the 'business environment' and free provision of services). The next part identifies experiences of rule-enforcing institutions: regime shopping, non-compliance with social standards, lack of cross-border enforcement, the difficulty of tracing circumvention in a transnational context and weak sanctioning mechanisms. The possibility of verifying, legally and in practice, whether a worker is correctly posted within the framework of the provision of services has become an Achilles heel of the enforcement of the use of cross-border recruited labour. The article also assesses whether the 2014 Enforcement Directive can be seen as an effective remedy for the identified problems.

Résumé

Le marché intérieur de l'Union européenne cherche à assurer la libre circulation des marchandises, des services, des capitaux et des citoyens. La primauté donnée à ces libertés économiques a culminé en une argumentation socio-économique dominée par la concurrence, entraînant des effets secondaires qui peuvent constituer une menace pour les conditions et les normes du travail. Cet article examine la relation problématique entre les libertés économiques et les normes du travail dans le contexte du recrutement transfrontalier de main-d'oeuvre. Il commence par un résumé de l'acquis communautaire en la matière, en particulier les règles relatives à la coordination de la sécurité sociale et aux conditions de rémunération et de travail des travailleurs détachés. Il examine les problèmes essentiels du « noyau dur » de la législation sur le marché intérieur (libre

Corresponding author:
Jan Cremers, Department of Social Law and Social Policy, Tilburg University, Montesquieu Building, room M 607, Prof. Cobbenhagenlaan 221, 5037 DE Tilburg, the Netherlands.
Email: j.m.b.cremers@uvt.nl

choix des contrats, liberté d'établissement pour les entreprises, déréglementations de l'environnement économique et libre prestation des services). La partie suivante identifie les expériences des institutions chargées de faire appliquer la loi: le régime shopping des entreprises, non-respect des normes sociales, absence de mise en oeuvre transfrontalière, difficultés de relever les traces de contournement dans un contexte transnational, et faiblesses des mécanismes de sanctions. La possibilité de vérifier, légalement et en pratique, si un travailleur est correctement détaché dans le cadre de la libre prestation des services est devenue le talon d'Achille de la mise en oeuvre de l'utilisation d'une main-d'oeuvre recrutée sur une base transfrontalière. L'article examine également si la directive d'exécution de 2014 peut être vue comme un remède efficace pour les problèmes identifiés.

Zusammenfassung

Der Binnenmarkt der Europäischen Union will die Freizügigkeit von Waren, Dienstleistungen, Kapital und Personen garantieren. Das Primat dieser wirtschaftlichen Freiheiten hat seinen Höhepunkt in einem sozio-ökonomischen Narrativ gefunden, das den Wettbewerb über alles andere stellt und damit Nebenwirkungen in Kauf nimmt, die eine Bedrohung für Arbeitsbedingungen und Arbeitsnormen darstellen. Der vorliegende Artikel untersucht das problematische Verhältnis zwischen wirtschaftlichen Freiheiten und Arbeitsnormen im Kontext der grenzüberschreitenden Anwerbung von Arbeitskräften und beginnt mit einer Zusammenfassung des relevanten *acquis communautaire* in der EU, insbesondere der Vorschriften zur Koordinierung der sozialen Absicherung sowie der Löhne und Arbeitsbedingungen entsandter Arbeitskräfte. Es folgt eine Übersicht über den „harten Kern" der Binnenmarktvorschriften (Vertragsfreiheit, Niederlassungsfreiheit, Deregulierung der wirtschaftlichen Rahmenbedingungen und freier Dienstleistungsverkehr). Im nächsten Teil werden Erfahrungen der rechtsdurchsetzenden Institutionen beschrieben: Regime Shopping, Nichteinhaltung von Sozialnormen, fehlende grenzüberschreitende Durchsetzung, Problematik der Ermittlung in Fällen von Rechtsumgehung in einem transnationalen Kontext und schwache Sanktionierungsmechanismen. Die Möglichkeit, rechtlich und in der Praxis zu überprüfen, ob ein Arbeitnehmer vorschriftsmäßig und im Rahmen des freien Dienstleistungsverkehrs entsandt wurde, ist zu einer Achillesferse der Durchsetzung von Vorschriften für den Einsatz von Arbeitskräften aus dem Ausland geworden. Der Artikel untersucht ebenfalls, ob die Durchsetzungsrichtlinie von 2014 als ein effektives Korrektiv der genannten Probleme angesehen werden kann.

Keywords

Internal market, cross-border labour recruitment, regime shopping, economic freedoms, freedom of establishment, free service provision, posting of workers, enforcement, labour standards

The EU *acquis* relevant for transnational labour recruitment

Some of the basic provisions for the free movement of workers and services date from the preceding EEC period. The 1957 Rome Treaty establishing the European Economic Community (EEC) contained several provisions aimed at ensuring social improvements for citizens. One of the fundamental freedoms was the free movement of citizens and workers (Treaty of Rome, 1957, Articles 48–51). The Treaty gives European citizens the right to go to another EEC Member State

to seek employment and to work in all EEC Member States. The guiding principle for free movement was (and is) the so-called *lex loci laboris* principle, which means that the regulations of the new country of residence will apply. Workers who move to another Member State have the right to be treated in social security schemes as if they are citizens of that host state (though benefits can be retained during the first three months of the stay). For pay and working conditions in the case of mobility for work, the *lex loci laboris* principle implies that discrimination on grounds of nationality is prohibited. This means that workers who come on their own initiative to work in a country other than their country of origin have the same rights and duties as the host country citizens.[1] They rely on the same remedies against breaches of their rights, whether through union membership or another type of collective representation, individual action or going to court (see Cremers, 2012).

From the very beginning, collisions emerged between the economic reasoning in the European Economic Community and the social policy covering labour standards and equal treatment of workers. In the period 1985–1994, the European social *acquis* received a boost after then European Commission president Jacques Delors called the social dimension a cornerstone of what was necessary for the completion of the internal market. This resulted in a social protocol (and the flanking social pact) that accompanied the Maastricht Treaty and an action programme with legislative social initiatives. However, by the end of the 1990s the political tide had turned and an absolute priority was given to 'competitiveness' and 'free trade'. The EU's eastern enlargement led to the accession of countries with hardly any tradition of 'social modelling' of industrial relations, and globalization and free trade lobby groups started to push for the deregulation of social standards. From that moment on, hardly any substantial piece of EU legislation was tabled and adopted in the social policy area. In recent years, this change of paradigm has culminated in the introduction of the deregulation dogma into the existing legislation.

Coordination of social security

The coordination of national social security schemes became one of the first regulated fields of cooperation related to the right to free movement (European Council, 1958). The subsequent Regulation 1408/71 governed social security coordination in Europe for more than 30 years. The coordination was based on the principle that persons moving within the EU are subject to the social security scheme of only one EU Member State. The renewed framework for this coordination (Regulation 883/2004 and its Implementation Regulation 987/2009, applicable from 1 May 2010) confirmed the principle of the country where the work is performed as the basic premise.

The 1971 Regulation already formulated one exception to this principle: the so-called posting of workers. This is a situation in which workers temporarily provide services in another EU Member State under the subordination of the posting company in their home country. These workers are brought under the application of the coordination principle for social security in the sense that they remain within the home instead of the host country regime during the posting period (Regulation

1 Article 45 TFEU (Treaty on the Functioning of the EU) confers substantive rights for the exercise of this fundamental freedom. Regulation (EU) No. 492/2011 further specifies these rights. Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers aims to bridge the gap between the law and its application in practice. The guaranteed rights are limited to EU citizens.

883/2004, Article 12(1)). Without serious opposition, the EU legislator decided in the 2004 revision to extend the maximum posting period from 12 to 24 months.[2]

The relationship that was construed with the free provision of services made posting a significant option within the framework of 'regime shopping' with low social security payments. The modification of the coordination rules led, within the framework of free movement of persons, to a series of debates about the application of home versus host country legislation, especially regarding the treatment of persons moving within the EU who temporarily pursue activities in (several) EU Member States other than the country of origin. By the late 1980s, the first indications of the practice of bypassing the applicable rules through the use of foreign labour-only subcontractors led to questions related to the role of cross-border labour recruitment and to the possibility of maintaining the *lex loci laboris* principle in the field of labour law and pay. Posting became part of a 'matrix of complex, semi-legal and outright unlawful employment arrangements involving cross-border contracts' (Clark, 2012).

Whether a social security institution in one country has the capacity and competence to judge the *bona fide* standing of a company with a registered office or place of business in another country became a key question. EU social security rules refer to an undertaking that ordinarily performs 'substantial activities, other than purely internal management activities, in the territory of the Member State in which it is established, taking account of all criteria characterizing the activities carried out by the undertaking in question' (Regulation 987/2009, Article 14(2)).[3]

Enforcement of the rules requires a broad mandate and horizontal competences of the controlling bodies, often beyond the boundary of their own discipline or constituency. Cooperation between competent authorities in involved countries is crucial. It also presumes the existence of reliable databases and the installation of adequately functioning institutions that supply the information, prevent fraud and monitor regularity.[4] In practice, control of the regularity of posting is still hindered by poor registration and a lack of competences in the host country (Van Hoek and Houwerzijl, 2011).

Working conditions and pay of posted workers

The internal market project created an attractive open market for businesses. However, there was ambiguity with regard to the applicable wages of workers posted abroad in the context of

2 Regulation 1408/71, Article 14(1)(a): (i) A worker employed in the territory of a Member State by an undertaking to which he is normally attached who is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of that work does not exceed twelve months and that he is not sent to replace another worker who has completed his term of posting.
Regulation 883/2004, Article 12(1) A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such activity does not exceed twenty-four months.

3 The European Commission elaborated this in a practical guide (2011). For instance, the expression 'which normally carries out its activities there' refers to an undertaking that ordinarily carries out substantial activities in the territory of the EU Member State in which it is established. If the undertaking's activities are confined to internal management, the undertaking will not be regarded as normally carrying out its activities in that EU Member State.

4 The EU developed an electronic system that can be used (IMI), but the exchange through IMI provides only limited data.

temporary service provision, given that they were not supposed to seek permanent access to the host country's labour market. There was no unified regulatory framework at EU level that made national labour standards mandatory for all workers nor were there comparable national laws and binding provisions in the Member States. Several countries excluded temporarily posted foreign workers from the application of the *lex loci laboris*. The enactment of the Posted Workers Directive (Directive 96/71, hereafter PWD) aimed to fill this gap. The starting point was compliance with national social policy frameworks and collectively agreed working conditions, with a hard core of minimum prescriptions. In addition, EU Member States could decide on general mandatory rules or public policy provisions applicable within their territory – as long as these rules did not lead to discrimination or protection of their market. The first drafts of the PWD stated that Community law 'does not preclude Member States from applying their legislation or collective labour agreements entered into by the social partners, relating to wages, working time and other matters, to any person who is employed, even temporarily, within their territory, even though the employer is established in another State' (European Commission, 1991: 11).

The European Court of Justice (ECJ) had ruled almost identically in two court cases in the 1990s. The ECJ stated in the *Rush Portuguesa* case (Case C-113/89, 1990): 'Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means'. The *Arblade* case (Case C-369/96, 1999) confirmed that provisions classified as public order legislation are crucial for the protection of the political, social and economic order. Both rulings gave the impression that the ECJ acknowledged the Member States' competence to define the regulatory framework for the protection of all workers who pursue their activities on their territory.

Problems emerged as the relationship was underscored between the working conditions of workers involved in temporary cross-border activities and the free provision of services. In successive cases, the ECJ judged that it is not up to EU Member States to define unilaterally the notion of public policy or to impose all mandatory provisions of pay and working conditions on suppliers of services established in another country. Rules and requirements that are not specified in the exhaustive list of the PWD have to be judged within the limits of the legislator's definition of mandatory rules (Bercusson, 2007; Cremers, 2011; Cremers, 2013b). According to this interpretation, EU Member States no longer had the unilateral right to decide on the mandatory rules applicable within their territory, even if these mandatory rules would guarantee better provisions for the workers concerned. The European Court of Justice, backed by the Commission, created a situation in which foreign service providers do not have to comply with mandatory rules that are imperative provisions of national law and that therefore have to be respected by domestic service providers. I have questioned elsewhere who, if not the EU Member States, are to decide which social provisions are to be respected:

> Europe then is no longer a unity of Member States with open markets combined with well-defined national social policy systems (a unity in diversity), but a unified economic bloc with a clear hierarchy: the radical ECJ interpretation of article 49 of the Treaty (now article 56 of the Lisbon Treaty) makes every national host country mandatory provision in principle a restriction on the free provision of services. (Cremers, 2011: 11)

The internal market is thus interfering directly with national social policies and, as a result, the *lex loci laboris* principle has come under pressure from social dumping (Bernaciak, 2015).

Contract law and the definition of an employment relationship

An important element of the monitoring and enforcement of cross-border labour recruitment is the definition of the labour contract. The PWD was formulated (in 1996) before the Rome Convention on the law applicable to contractual obligations (1980) was revised to become Regulation 593/2008. The Directive thus referred to the 1980 legislation in this field. The Rome Convention on the law applicable to contractual obligations (1980) defined it as follows: 'A contract shall be governed by the law chosen by the parties'. However, Article 3 stated that this choice of using the employment contract 'shall not . . . prejudice the application of rules of the law at the country which cannot be derogated from by contract, hereinafter called "mandatory rules"'. The PWD made explicit reference to Article 6 of this Convention, noting that 'the choice of law made by the parties is not to have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law' (Recital 9).[5] The Directive also noted 'that effect may be given, concurrently with the law declared applicable, to the mandatory rules of the law of another country, in particular the law of the Member State within whose territory the worker is temporarily posted' (Recital 10). In Article 2(2) the Directive made explicit that 'For the purposes of this Directive, the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted'.

The ECJ neglected this reasoning, especially in cases where it restricted the competence to monitor the existence of a labour contract exclusively to the sending country (Case C-341/05 *Laval* in 2007, Case C319/06 *Commission v Luxembourg* in 2008). The result was that countries in which the work was pursued became completely dependent on the competence and cooperation of the authorities in the country of residence of the service provider or the home country of the worker. Systematic and effective control in the host country became an illusion and in the time it took to wait for a reply to information requests, the employer and the posted workers most often had disappeared. To counteract this, the European Commission tried to streamline the request for information (European Commission, 2007), but this procedure had a non-binding character.

In the *Luxembourg* case the ECJ also neglected Directive 91/533/EEC and its reference to the Rome Convention – Luxembourg required a written (labour) contract for all employees, whether they were national or foreign citizens – and made compliance control and enforcement of the obligations of Directive 91/533/EEC exclusively the competence of the sending country. Directive 91/533 stipulates that workers must be in the possession of the necessary documents before departure abroad. The documents prescribed are 'a written contract of employment and/or a letter of appointment and/or one or more other written documents'. Thus, a legitimate reasoning could be that if employers do not provide to the host country the documents prescribed by Directive 91/533, Articles 6 and 7 of the Rome Convention (now Article 8(4) Regulation 593/2008) can be applied – in which the contract is more closely associated with the host country.

5 According to Article 6 of the Convention the choice of law governing the contract must not deprive the worker of otherwise mandatory protections (in terms and conditions of employment). Where the choice of law does not apply, the contract must be governed by (a) the law where the employee 'habitually carries out his/her work', or (b) if there is no clear 'habitual' country of employment, either the law where 'the place of business through which he was engaged is situated', or the law of the country with which the contract is more closely connected. Article 7 determines that where 'the situation has a close connection' with a country, the mandatory rules (for example, on labour standards) can be said to be in effect, if these rules apply 'whatever the law applicable to the contract'. In considering whether to apply the mandatory rules, the nature, purpose and consequences of (non-) application must be considered.

In recent cases the ECJ (since 2009 renamed the Court of Justice of the European Union, CJEU) seems to have realized what negative effects the primacy of the economic freedoms can have on the functioning of the PWD. In a Finnish case of Polish workers being underpaid (C-396/13), the CJEU underlined that the terms and conditions of employment guaranteed to posted workers are to be defined by the law of the host Member State (as long as these conditions are declared 'universally applicable, binding and transparent'). In this case, the foreign subcontractor contested that the trade unions in the host country had standing to bring proceedings to the court, given that the employment relationship was based on the law of the home country. Thus, the CJEU had to decide on the question of whether the right to an effective remedy, as laid down by the Charter of Fundamental Rights, of claims assigned by the PWD, could be blocked by the rule of the home country (that prohibited the assignment of claims arising from the employment relationship). The CJEU ruled that the trade union in the host country was eligible, as its standing was governed by Finnish procedural law and as the PWD makes clear that questions concerning minimum rates of pay are governed, whatever the law applicable to the employment relationship, by the law of the host country.

Nevertheless, the existing ambiguity with regard to the host country competences has significant implications for the application of rights-based mobility regulation: access to rights is determined in a complex web of national, EU and international obligations. Besides, the CJEU's limited focus on the PWD as a source of rights could be said both to be opposed to the intentions of the legislators in adopting the Directive and to have significant consequences for de facto access to or acknowledgement of rights: if securing workers' rights is subject to non-binding requests for information between Member States, implementation of rights regulations is unlikely to be successful.

Freedom of establishment and free provision of services

The right to establish a company goes hand in hand with the freedom to provide services.[6] Since the late 1990s, the notion that company law 'should provide for a flexible framework for competitive business' (High Level Group of Company Law Experts, 2002a, b) has become the mainstream policy. EU company law reform has led to an emerging transnational 'competitive' legal pluralism that in the long run is stimulating regime shopping within the EU. The starting point nowadays seems to be competition between systems of company law, making company law just one production factor among others, such as infrastructure or skilled workers, which are considered before establishment in a particular country (Cremers, 2013a). Both EU legislation and case-law provide firms with the opportunity to be founded in accordance with the law of one EU Member State and to have their registered office, central administration or principal place of business in another EU Member State. Companies can install a considerable part of their legal frameworks in other EU Member States without pursuing any activities there and get market access elsewhere. This can be seen as a by-product of legislative interest in allowing companies the benefit of freedom of establishment. Combined with the freedom to provide services that, according to case-law,

6 Articles 49 and 56 TFEU state that Member States are obliged to ensure unhampered right of establishment of EU nationals and legal persons in any Member State and the freedom to provide cross-border services. The Enforcement Directive (Directive 2014/67/EU of the European Parliament and the Council, OJ L 159, 28.5.2014) confirms this link in its first recital: the free movement of workers, freedom of establishment and freedom to provide services are fundamental principles of the internal market in the Union enshrined in the Treaty on the Functioning of the European Union.

requires not only the elimination of all discrimination on grounds of nationality against providers of services established in another Member State, but also 'the abolition of any restriction, even if it applies to national providers of services', this policy has created the possibility for letter-box companies to be created through artificial arrangements in order to circumvent national mandatory rules and obligations (Lenaerts, 2011).

Restrictions on the freedom of establishment are scarce in the EU Treaty and ECJ/CJEU case-law. The relevant legislation in this area neither provides substantial direct effective instruments to distinguish between genuine and fake undertakings nor facilitates the fight against abusive practices. There is hardly any effective control of whether an established subsidiary is pursuing activities or is not involved in real activities and national labour standards thus far are barely seen as overriding reasons in the public interest in this area. In one case, focusing on tax evasion, the CJEU stated that strict national legislation was acceptable as long as it pursued legitimate objectives that were compatible with the Treaty and constituted overriding reasons in the public interest, such as the prevention of abuse or fraudulent conduct, or the protection of the interests of, for instance, creditors, minority shareholders, employees or the tax authorities. A proportionality test of the national measure was added to the criteria to ascertain whether the provision at issue goes beyond what is necessary to attain the objectives pursued.[7] The fact that a company was formed in a particular EU Member State for the sole purpose of enjoying the benefit of more favourable legislation, such as flexible company law, taxation advantages or easy registration rules, does not constitute an abuse – even if that company conducts its activities entirely or mainly in another state – as long as the protection of third parties' interests is not at stake. Overall, there are crucial limits to the restrictions related to the application of social policy provisions.

Cross-border labour recruitment as a 'provision of services'

The regulation of the posting of workers was meant neither to provide a regulatory framework for cross-border temporary work agencies nor to fuel the creation of a new type of recruitment industry. The PWD intended to establish a legislative framework for working conditions in case of the temporary commercial activities of (sub-)contractors in another legal territory.[8] Notwithstanding this, the posting rules within the framework of the cross-border provision of services have become increasingly an alternative way to recruit 'cheap' labour. A substantial number of publications identify posting completely with temporary agency work. An ILO working paper states: 'Within EU Member States, private employment agencies can recruit workers in one country and post them in another. This is regulated through the Posting of Workers Directive (96/71/EC) and its subsequent Enforcement Directive' (ILO, 2015).

A need to clarify the posting rules and what it means to provide services in other Member States with posted workers is therefore evident. For the determination of the applicable rules in cases of free provision of services with temporary posted workers one key question is whether the

7 In the *Societé de Gestion Industrielle* (Case C-311/08, 2010) judgment, the CJEU argued that European law did not affect the possibility of national legislation/measures to prohibit companies from invoking EU law when, in reality, these 'wholly artificial arrangements' were designed to circumvent national legislation (abuse of the freedom of establishment by foreign companies through artificial arrangements in order to escape mandatory rules).

8 One of the first drafts of the PWD produced by the European Commission (early 1990, author's archive) is titled 'Proposal for a Community instrument on working conditions applicable to workers from another state performing work in the host country in the framework of the freedom to provide services, especially on behalf of a sub-contracting undertaking'.

companies involved are genuine undertakings. As already mentioned, EU coordination rules pertaining to social security refer to 'substantial activities'. In practice, a social security institution in one country has neither the capacity nor the competence to judge the bona fide standing of a company that has a registered office or place of business in another country. Notions of the 'genuine' character of an undertaking, elaborated by the Commission's social and transport departments, have had no serious impact on the policy related to the freedom of establishment developed by other Commission services, where the fight against 'administrative burden' has become the guiding principle. The Directorates-General for the Internal Market and for Competition remain firm promoters of the free establishment principle with, as a result, very limited possibilities for other countries than the country of establishment to control the genuine character of undertakings. The dominant policy of the Commission (and of most national legislators) was and is to ease the establishment of undertakings, without strong provisions governing the activities of service providers at home or abroad. The Commission is very active with infringement procedures as soon as a country creates 'restrictions or barriers to the free provision of services' (for example, the *Luxembourg* rulings); additional domestic administrative rules should not hinder this freedom. The Court of Justice has judged that different treatment of foreign undertakings can be accepted only on the grounds of public policy, public security and public health. All other restrictions of the freedom of establishment have to be objectively justified in accordance with case-law. This has made countries pull back from controlling foreign undertakings and enforcement institutions, such as the labour inspectorate, have been discouraged in their fight against breaches of the rules.

Comparative national research in 2010 on the functioning of the posting rules within the framework of the free provision of services revealed that problems appear as soon as cross-border labour-only contracting or subcontracting is presented as the provision of services (Cremers, 2011). The use of the posting mechanism has ranged from normal and decent long-established partnerships between contracting partners to completely fake letter-box practices of labour-only recruitment. Groups of workers have been recruited via agencies, gangmasters and letter-box companies, advertising and informal networking. Posting has become one of the channels for the cross-border recruitment of 'cheap' labour without reference to the rights that can be derived from EU law on genuine labour mobility. A concentration of posted workers in the lower echelons of labour markets bears the risk of an erosion of labour standards and evasion of mandatory rules. This type of regime shopping leads to serious risks, such as the distortion of competition and a downward pressure on pay. If not subject to proper monitoring and enforcement, employment conditions, in particular wages, offered to posted workers may undercut the minimum conditions established by the host country's law or negotiated under generally applicable collective agreements and undermine the organization and functioning of local or sectoral labour markets.

Economic freedoms and the enforcement of labour standards

Adequate and effective implementation and enforcement are key elements guaranteeing the effectiveness of the applicable EU rules (European Commission, 2007; 2008). In the 2014 Enforcement Directive the EU legislator adds 'in protecting the rights of posted workers and in ensuring a level playing field for the service providers' (Recital 16).[9] However, the Commission had so far neglected the problems related to the question of whether the recruiter is a genuine undertaking, as well as control of the existence of a labour contract and of compliance with the corresponding

9 Directive 2014/67/EU of the European Parliament and the Council, OJ L 159, 28.5.2014.

working conditions, whereas the Court rulings restricted the necessary control and enforcing competences to the country of origin. The fight against the 'administrative burden' made systematic and effective control in the host country an illusion. Besides, a reply to requests for information (for instance in order to identify a service provider) depended on the cooperation of the home country. This could take time and by then the employer and the workers had often disappeared.

A series of transnational projects initiated by the French umbrella organization of labour inspectors INTEFP (in the period 2011–2015) underscored most of these enforcement problems. The project confirmed that fraudulent posting is used to circumvent the national regulatory frames of pay, labour, working conditions and social security in the host state. Irregularities were identified with cross-border recruitment via (temporary) agencies and bogus self-employment in cases where the distinctions between a commercial contract for the provision of services and a labour contract were blurred. An accumulation of breaches was the rule rather than the exception once irregularities were detected. Inspectors were confronted with fake posting, a shift to other industries, wages and/or working conditions less favourable to workers (regime shopping), manipulation of free establishment and of the country of residence (fictitious companies and arrangements). They found abuses with deductions of entitlements and non-compliance with provisions guaranteed by the posting rules (working time, minimum wage, pay scaling not in line with skill level, deductions for transport and lodging). Poor registration, the absence of timely, reliable notification and the lack of necessary competence in the host country hindered the adequate control of regularity and the collection of evidence. Effective solutions cannot be found as long as essential tools to control compliance, such as registration and notification in the host country, are seen as an administrative burden. Even more relevant is the question of where the competence lies for the overall control of compliance. Poor implementation makes legislation a paper tiger, and conflicting or powerless legislation is worse than no legislation at all.[10]

The freedom of establishment has created an industry of incubators, specialized in 'social engineering' that can deliver ready-made companies with no other purpose than to circumvent national regulations, labour standards and social security obligations. In order to avoid social dumping and the distortion of competition for domestic service providers and to establish a level playing field for these service providers, a policy of prevention of fraud and anticipation of abusive practices is needed. In theory, the EU has started to tackle this problem, but this policy is still in its infancy. Besides, workers in a foreign constituency who have been exploited live and work far away from this theoretical dispute. Their possibilities to derive rights from these highly abstract judicial deliberations are neither locally available nor easily accessible.

Enhanced monitoring of workers' rights within reach?

The possibility of verifying, legally and in practice, whether a worker is correctly posted within the scope of the PWD is an Achilles heel of enforcement of the correct use of cross-border recruited labour within the framework of the provision of services. The competence to decide on liability in cases of fake self-employment and/or fake posting should not be blurred by Court rulings about home versus host country competences and responsibilities. Access to justice in case of abuses that are the outcome (or the side-effect) of the economic freedoms has to be a fundamental right that makes victims eligible all over Europe, not only in the sometimes obscure country of establishment of his/her undertaking. The competence to define who is deemed to be the real and genuine

10 http://www.eurodetachement-travail.eu/synthese/experts-viewpoint.html

employer and who can be held liable in cases of fake posting by letter-box companies should not be restricted to the (often non-existent) home country of these establishments. Otherwise, the correlation with the freedom of establishment and the free provision of services will obstruct fundamental legal and political solutions. The internal market project has already given too much primacy to the free provision of services over the *lex loci laboris* principle.

It was quite some time before the Member States reacted; even the Member States directly concerned by the different ECJ/CJEU cases refrained from focusing on the problems. In the EPSCO Council, the principal legislator, which brings together ministers responsible for employment, social affairs, health and consumer policy from EU Member States, the advocates of a liberalized labour market characterized by deliberate competition in the field of working conditions and pay have clashed with representatives from countries that favour the creation of a level playing field based on the existing national regulatory framework (the Rhineland or social model). The main driver for change was the European Parliament, which forced European Commission President Barroso during the debates for his second term to promise an initiative for the enforcement of the principles of the PWD.

The resulting Enforcement Directive (Directive 2014/67/EU, to be transposed before June 2016) was meant to bring an end to almost 20 years of debate (and the series of controversial Court cases) about the (dis)functioning of the PWD (Directive 96/71/EC). The Enforcement Directive aims to improve the implementation and application in practice of the PWD, thereby guaranteeing better protection of posted workers and a more transparent and predictable legal framework for service providers. It contains a list of factual elements to help in the assessment of whether a specific situation qualifies as a genuine posting (Article 4). It lays down national control measures that are considered justified and proportionate and which may be applied in order to monitor compliance with the PWD and the Enforcement Directive itself (Article 9). To increase the protection of workers' rights in subcontracting chains, EU countries must ensure that posted workers can hold the contractor in a direct subcontractor relationship liable for any outstanding net remuneration corresponding to the minimum rates of pay, in addition to or in place of the employer (Article 12). The Directive prescribes improved access to information on the terms and conditions of employment and on collective agreements applicable to posted workers available free of charge via a single official national website (Article 5). The information must be made public in the official language(s) of the host country and in the most relevant languages, taking into account demand in its labour market. Finally, the Directive talks about enhanced administrative cooperation between national authorities in charge of monitoring compliance, including time limits for the supply of information (Article 6).

The question is whether the implemented Enforcement Directive can provide the necessary instruments, taking into account the problems with which posted workers (and controlling institutions) have to deal. It is worth looking at some of the basic aspects and assessing some of the weaknesses of the adopted Directive.

(i) Competence

Several recitals of the Enforcement Directive deal with the competence of the host state. Recital 8 assigns the competence to the competent authority of the host Member State 'to examine the constituent factual elements characterising the temporary nature inherent in the notion of posting, and the condition that the employer is genuinely established in the Member State from which the posting takes place'. Recital 10 adds to this the identification of workers falsely declared self-employed. Article 4 hands the overall assessment over to the competent authority in the host

country. But, at the same time, the Directive limits the possibility to inquire and control to measures that are necessary to carry out effectively their supervisory task, without further specification of what this means. Besides that, notification of the planned posting, in fact a basic tool and starting point for any control, has to be done 'at the latest at the commencement of the service provision' – a rather symbolic provision.

(ii) Genuine undertaking

With regard to the genuine character of the posting company the Directive has several references to the issue of the condition that the employer is genuinely established in a 'sending' country. However, the Directive does not touch on the fundamental question of what will have primacy in future court cases. Is it possible for the host country to call a company non-genuine if that company is formally established in another country, and legitimized by that country's deregulated corporate system? Or will the CJEU give primacy to the freedom of establishment and the free provision of services (both belonging to primary EU law, as laid down in the Treaty)?

(iii) Employment relationship

With the Enforcement Directive the harsh ECJ judgment in the *Luxembourg* case (C-319/06 in 2008) that control of the employment relationship is an exclusive competence of the sending country is abandoned. Several recitals hand over the competence, for instance, to identify workers falsely declared self-employed to the host country. Recital 10 quotes the original PWD 'the relevant definition of a worker is that which applies in the law of the Member State to whose territory a worker is posted'. Even more important is the fact that the obligation to provide an employment contract or an equivalent document within the meaning of Directive 91/533/EEC is explicitly included in the list of accepted measures.[11]

(iv) Liability

The liability paragraph was one of the most controversial items during the legislative discussions on the Directive. The final text has been watered down, as a result of which the provision on liability in the chain of subcontracting is weak compared with some existing national systems. The Directive states that Member States remain free to provide for more stringent liability rules under national law or to go further under national law on a non-discriminatory and proportionate basis; this is a rather unstable legal basis.[12] Only for the construction sector does the Directive make it binding on Member States to provide for measures. Moreover, the liability scheme that is provided is limited to the one layer of (sub-) contracting and can be bypassed based on 'due diligence'. It is up to the Member States to make this part of the Directive operational.

11 Directive 91/533/EEC guarantees every worker in Europe proof of an employment relationship. In earlier research, it was called the most poorly implemented EU Directive (Cremers, 2011).

12 Several minimum prescriptions, formulated in the early 1990s, soon became maximum prescriptions and countries that had a more progressive social policy came under pressure because of 'assumed gold-plating'.

(v) Redress

Is it easier for posted workers, confronted with abuses, to seek justice? In earlier research we listed the arduous route for posted workers through tribunals and courts (Cremers, 2011). To mention only a few experiences: courts are unfamiliar with posting issues, often not committed to collective agreements and not aware of fundamental rights; evidence obtained in one Member State is not automatically recognized by courts in other EU countries; and fines are symbolic and are often not enforced. The Enforcement Directive meets some of the requirements for a sound solution. For instance, the transnational recognition of sanctions is settled. The Directive makes the posted worker eligible in the host country where it says that Member States shall 'ensure that there are effective mechanisms for posted workers to lodge complaints against their employers directly, as well as the right to institute judicial or administrative proceedings, also in the Member State in whose territory the workers are or were posted' (Article 11). It broadens the possibility to apply complaints mechanisms through which posted workers may lodge complaints or engage in proceedings either directly or, with their approval, through relevant designated third parties, such as trade unions or other associations as well as common institutions of the social partners. A firm interpretation during the national transposition leading to types of collective redress could bring real improvements for posted workers.

The Juncker team, currently at the helm of the European Commission, has promised to work beyond the Enforcement Directive towards a 'targeted review' of the posting rules. Furthermore, a group of seven ministers responsible for social affairs and labour published an open letter to the Commission with a plea to modernize the posting rules by applying the principle 'equal pay for equal work in the same place'.[13] The ministers underlined that services of a temporary nature have evolved to services with a semi-permanent character. The improper or abusive use by service providers of a system that brings substantial cost advantages, with less social protection of the workers must end. Therefore, a more accurate and harmonized interpretation of the rules is needed. According to the ministers, the concluded Enforcement Directive does not 'alter the fact that the Posting of Workers Directive in its present form does not sufficiently address the principle of equal pay for equal work in the same place'. Their suggestions for revision are:

- a widening of the scope and amendments of the provisions regarding working conditions;
- the promotion of more equal treatment and further improvement of the working conditions of posted workers;
- addition of a legal base that goes back to articles in the Treaty with social objectives, thereby giving more guidance to the CJEU (aiming social and labour protection at cross-border workers);
- look at methods to control effectively the temporary nature and duration of posting;
- mainstream the posting concepts regulated in the PWD and in the coordination of social security.

Never before have Member States acted so prominently in this area. It has to be hoped that this is a 'window of opportunity' for future improvements. A reaction of nine ministers, mainly from Central and Eastern European countries, however, makes clear that future revision of the PWD is not a matter of course.[14]

13 Government of the Netherlands. https://www.government.nl/government/contents/members-of-cabinet/lodewijk-asscher/news/2015/06/19/seven-countries-want-fair-rules-for-posted-workers-in-eu

14 http://www.europaportalen.se/sites/default/files/dokument/nio_medlemsstater_utstationeringsdirektivet_augusti_2015.pdf

Funding

This research received no specific grant from any funding agency in the public, commercial, or not-for-profit sectors.

References

Bercusson B (2007) Collective action and economic freedoms before the European Court of Justice. Brussels: ETUI.

Bernaciak M (ed.) (2015) *Market Expansion and Social Dumping in Europe*. Brussels: ETUI.

Clark N (2012) *Regulation and Enforcement of Posted Workers' Employment Rights*. London: Working Lives Research Institute.

Council of the European Economic Community (1958) Regulation (EEC) No. 3 of 25 September 1958, OJ No. 30, 16.12.1958. Brussels.

Cremers J (2011) *In Search of Cheap Labour in Europe. Working and Living Conditions of Posted Workers*. Utrecht: CLR/International Books.

Cremers J (2012) Free movement of workers and rights that can be derived. FMW, Online Journal on free movement of workers within the European Union. Available at: http://ec.europa.eu/social/main.jsp?catId=737&langId=en&pubId=6884&type=1&furtherPubs=yes

Cremers J (2013a) From Harmonisation to Regulatory Competition. In: Vitols S and Heuschmid J (eds) *European Company Law and the Sustainable Company: A Stakeholder Approach, Vol. 2*. Brussels: ETUI, pp. 89–114.

Cremers J (2013b) Free provision of services and cross-border labour recruitment. *Policy Studies* 34(2): 201–220.

European Commission (1991) Proposal for a Council Directive Concerning the Posting of Workers in the Framework of the Provision of Services. COM(91) 230 final-SYN 346.

European Commission (2007) *Posting of Workers in the Framework of the Provision of Services: Maximising its Benefits and Potential while Guaranteeing the Protection of Workers*. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM(2007) 304 final, 16 March 2007, Brussels.

European Commission (2008) Recommendation of 31 March 2008 on Enhanced Administrative Cooperation in the Context of the Posting of Workers in the Framework of the Provision of Services. OJ No. C85/01, 4 April 2008. Luxembourg.

High Level Group of Company Law Experts (2002a) A Modern Regulatory Framework for Company Law in Europe: A Consultative Document of the High Level Group of Company Law Experts. Brussels.

High Level Group of Company Law Experts (2002b) A Modern Regulatory Framework for Company Law in Europe – Report, November 2002. Brussels.

Hoek van A and Houwerzijl M (2011) Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union, commissioned by the European Commission. Available at: http://ec.europa.eu/social/main.jsp?catId=471

ILO (2015) Regulating labour recruitment to prevent human trafficking and to foster fair migration: Models, challenges and opportunities. Working Paper. Available at: http://www.ilo.org/global/publications/working-papers/WCMS_377813/lang–en/index.htm

Lenaerts K (2011) Self-employed and Europe: Small businesses and the freedom to provide services. *European Journal of Law* 1: 32–48.

The Treaty of Rome (1957) 25 March 1957. Available at: http://ec.europa.eu/economy_finance/emu_history/documents/treaties/rometreaty2.pdf